

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE SUARES,

Defendant and Appellant.

B294317

(Los Angeles County

Super. Ct. No. BA347720)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura F. Priver, Judge. Affirmed in part; reversed in part.

Patricia S. Lai, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Noah P. Hill and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

In his third appeal in this matter, defendant Jesse Suares appeals from the trial court's decision on remand not to exercise its previously unavailable discretion under Penal Code section 12022.5¹ to strike a firearm enhancement. Defendant contends the trial court abused its discretion, by failing to consider his rehabilitative and behavioral achievements in prison. We conclude otherwise. The trial court considered defendant's personal history and progress while in custody, but determined his achievements were outweighed by his criminal history and dangerous nature of the offenses he committed.

Second, defendant maintains that, because this case is not yet final, the matter should be remanded to permit the trial court an opportunity to exercise its discretion under Senate Bill No. 1393 to strike an enhancement imposed under section 667, subdivision (a)(1). Third, defendant contends that, on remand, he should be given an opportunity not previously provided him to demonstrate his inability to pay fees and assessments imposed against him. Finally, defendant asserts that the abstract of judgment must be modified so the court operations and criminal conviction assessments against him correspond to the correct number of convictions. We agree (and respondent does not contest) that defendant's final three contentions have merit. Accordingly, we will remand the matter, (1) to permit the trial court an opportunity to exercise its discretion to strike the section 667, subdivision (a) enhancement; (2) to provide defendant an opportunity to

¹ Undesignated statutory references are to the Penal Code.

demonstrate his inability to pay fees and assessments; and (3) to order the trial court to correct the abstract of judgment to reflect the proper amount of assessments.

FACTUAL AND PROCEDURAL BACKGROUND

We need not discuss the broader factual background, or all charges of which defendant was initially convicted. The essential undisputed facts are these: in October 2008, defendant pointed a loaded gun at someone and referred to a gang. He then drove away and was pursued by the police until he crashed and injured several people. Defendant fled the crash scene on foot and fought with officers who pursued him. Following his arrest, the police found cash and methamphetamine near defendant, and found a handgun and ammunition in his car.

In defendant's first appeal in this case we affirmed his convictions on eight of nine counts. (*People v. Suarez* (April 25, 2013; B241594) [nonpub. opn.]) The federal District Court subsequently granted defendant relief on his federal habeas action claiming ineffective assistance of counsel. Defendant's second appeal to this Court followed a resentencing hearing at which the trial court imposed a total term of 33 years. In our decision in the second appeal we, among other things, remanded the matter to permit the trial court, in light of a recent amendment to the statute, "to exercise its discretion under section 12022.5 to determine whether to strike the firearm enhancement imposed" against defendant on his conviction for assault with a

semiautomatic firearm. (See *People v. Suarez* (June 4, 2018, B280098) [nonpub. opn].)

This third appeal follows the trial court’s decision not to strike the firearm enhancement.

DISCUSSION

I. *The Firearm Enhancement*

When defendant was first resentenced in December 2016, the trial court imposed a four-year term on the firearm enhancement (§ 12022.5) and stayed punishment under section 654. In a second hearing in October 2018, after remand from this court in the second appeal, the trial court declined to strike the firearm enhancement. Defendant contends the trial court erred in that ruling by erroneously proceeding under the impression that it lacked the discretion to consider the entire sentencing scheme, and overlooked the fact that we previously reversed the conviction on a lesser included offense and stayed sentencing as to another conviction under section 654. Defendant also contends the trial court ignored his personal history and rehabilitative progress since his initial sentencing.

Defendant’s claim lacks merit. First, the minute order from the October 2018 hearing demonstrates the court was aware we had reversed one conviction (as to a necessarily included offense) and stayed a concurrent sentence for another.² As respondent observes, these

² The minute order states: “Count 1 was reversed—therefore the firearms and gang enhancement are stricken and there is no sentence as to

changes to the judgment did not lessen defendant’s culpability for his criminal conduct.

Second, defendant relies on the trial court’s statement that the proceeding on remand was for the “very limited purpose” of determining whether “to strike the enhancement under 12022.5 as to count 9[,]” and “not [to] resentenc[e] [defendant].” But nothing in this statement suggests that the court misunderstood the scope of its discretion. Defendant’s counsel urged the trial court to consider defendant’s efforts at education and rehabilitation, his recognition that he needed to embrace a new belief system (as an alternative to the abusive environment in which he was raised), and his efforts to mentor and improve the lives of other inmates. The prosecutor, on the other hand, argued the court should limit its consideration to the strict terms of the remittitur and sentencing factors at the initial sentencing.

In response, the trial court observed it was free to “consider what [it] want[ed] to consider.” The court acknowledged that defendant had “made significant strides” while in custody, and was “entitled to have the court consider the whole package.” Nevertheless, the court observed that, in deciding whether to exercise its discretion to strike the allegation, it had to place “some emphasis . . . on the facts of the case . . . at the time [defendant] was originally sentenced[,]” and “consider

count 1. [¶] Count 7—the sentence was stayed pursuant to . . . section 654. [¶] Count 9, the court exercised its discretion as ordered by the higher court. The court chose not to strike the enhancement. The sentence in count 9 stands.”

the nature of [defendant's] offense at the time" of commission, noting that defendant conceded having "engaged in highly dangerous behavior" by pointing a loaded gun at someone. Thus, the record reflects that before exercising its discretion not to strike the gun enhancement, the court considered everything it was entitled to consider: the facts of defendant's crimes, his personal and criminal history, and his good behavior and the strides he made while in custody.

Third, our remand order did not *require* resentencing. It required only that the court exercise its discretion to determine whether circumstances warranted striking the enhancement. Resentencing was necessary only if the court concluded the firearm enhancement should be stricken. (See, e.g., *People v. Rodriguez* (1998) 17 Cal.4th 253, 258-260, superseded by statute on other grounds as noted in *People v. James* (2001) 91 Cal.App.4th 1147, 1149 [observing that the appellate court's remand to permit the trial court to make a threshold determination whether to exercise its discretion to grant a request to dismiss a prior does not necessitate resentencing]; *People v. Murphy* (2001) 88 Cal.App.4th 392, 394-397.)

In sum, there is no merit to defendant's assertion that the trial court's decision was not made with "informed discretion" (see *People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8 [exercise of "informed discretion" requires that trial court be aware of its discretionary power to review the entire sentencing scheme]), or that the decision was arbitrary, exceeded the bounds of reason or was made without considering all relevant circumstances. (See *People v. Carmony* (2004)

33 Cal.4th 367, 377 [“a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it”].)

II. *Remand*

A. *Section 667, subdivision (a)(1)*

At the time of the October 2018 hearing on remand, defendant’s sentence included a five-year enhancement for a prior serious felony conviction. (§ 667, subd. (a)(1).) The court acknowledged it had “no discretion [as to] the five-year prior,” but said that it would not exercise its discretion to strike that enhancement even if it had such discretion. Since that date, the Legislature enacted Senate Bill No. 1393 (effective Jan. 1, 2019), amending sections 667 and 1385 to confer discretion on a sentencing court to strike or dismiss a prior serious felony enhancement under section 1385. Given the limited scope of the prior remand (solely to consider whether to strike the section 12022.5 enhancement, and to resentence only if the court decided to do so), we do not consider the court’s comment—that it would not strike the section 667, subdivision (a) enhancement even if it could—to be determinative as to whether remand is required. The parties agree, as do we, that because the matter is not yet final, remand is in order for a new hearing to permit the trial court to consider whether to strike the section 667, subdivision (a) enhancement. (*In re Estrada* (1965) 63 Cal.2d 740, 745; see *People v. Floyd* (2003) 31 Cal.4th 179, 184; *People v. Babylon* (1985) 39 Cal.3d

719, 722 [“absent a saving clause, a criminal defendant is entitled to the benefit of a change in the law during the pendency of his appeal”].)

B. Ability to Pay

Defendant contends that the trial court erred in imposing a \$240 restitution fine and \$560 in assessments without making a determination as to his ability to pay. Current case law requires that, assuming the defendant so requests, a trial court not impose fines, fees or assessments against an indigent defendant absent a determination of the defendant’s present ability to pay. (*People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1168.) Typically, a defendant must first contest in the trial court an inability to pay fines, fees and assessments imposed by that court. (*People v. Castellano* (2019) 33 Cal.App.5th 485, 490.) However, given that we must remand the case for additional proceedings on the section 667, subdivision (a) enhancement, the parties (and we) agree that on remand, defendant should be given an opportunity to present evidence demonstrating whether he is able to pay the fines, fees and assessments imposed. (*Id.* at p. 491.)

C. Abstract of Judgment

Finally, the abstract of judgment reflects assessments imposed against defendant of \$320 for court operations assessments (§ 1465.8) and a total of \$240 for criminal convictions assessments (Gov. Code, § 70373). These were calculated based on his conviction on eight

counts, one of which we reversed in the prior appeal.³ Assessments may be corrected at any time. (*People v. Lopez* (2010) 188 Cal.App.4th 474, 480.) Accordingly, depending on whether defendant on remand makes a showing of inability to pay, the trial court must modify the abstract of judgment to reflect calculations for court operations and criminal assessments, based on the seven counts of which defendant now stands convicted. (See § 1465.8, subd. (a)(1) [absent certain exceptions, a \$40 “court operations” assessment is to be imposed for each criminal offense]; Gov. Code, § 70373, subd. (a)(1) [requiring a \$30 court facilities assessment for each felony or misdemeanor conviction].)

DISPOSITION

The matter is remanded to permit the trial court to exercise its discretion under Senate Bill No. 1393 to strike the section 667, subdivision (a) enhancement, to permit defendant to request a hearing as to his ability to pay fines and assessments imposed, and to modify the abstract of judgment to reflect the proper amount of assessments for

³ The court operations assessment requires a trial court to impose an assessment of \$40 on “every conviction for a criminal offense,” with certain exceptions, to assist in funding court operations. (§ 1465.8, subd. (a)(1).) The convictions assessment requires a trial court to impose an assessment of \$30 for each misdemeanor or felony to ensure adequate funding for court facilities. (Gov. Code, § 70373, subd. (a)(1).)

court operations and court facilities based on seven convictions, not eight. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.